

Message

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Sent: 12/31/2020 12:45:19 PM
To: Beers, Samantha [beers.samantha@epa.gov]
Subject: RE: Inside EPA Article on New NEPA Rules

Sounds like we'll have some happy days ahead!

From what I read before, and what you said, she is extremely well qualified.

This article added her conservation background which is meaningful for CEQ as well. Have you heard the 30% conservation goal by 2030? I'll send you an article on it. I want to see if we can build that into some CBP work on wetlands restoration to jump start it.

Happy new year to you and your family as well!

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From: Beers, Samantha <Beers.Samantha@epa.gov>
Sent: Thursday, December 31, 2020 7:35 AM
To: Esher, Diana <Esher.Diana@epa.gov>
Subject: Inside EPA Article on New NEPA Rules

In case you missed this.

Happy New Year

With Mallory At CEQ Helm, White House Expected To Undo NEPA Rollbacks

December 24, 2020

President-elect Joe Biden's selection of Brenda Mallory to lead his White House Council on Environmental Quality (CEQ) is being widely hailed as a smart choice by environmental groups and others, especially given CEQ's expected key role in undoing the Trump administration's National Environmental Policy Act (NEPA) rollbacks.

In addition, observers expect Mallory to be influential in elevating both climate change and environmental justice (EJ) considerations in NEPA reviews for projects across the government.

Ted Boling, a longtime CEQ career official who recently went into private practice, tells *Inside EPA* that Mallory is "extraordinarily well qualified for this role."

One of the more interesting aspects of Mallory's experience "that hasn't really gotten covered is she brings such diversity of work and background in environmental law," he notes. "She knows the Antiquities Act and national monuments and with that, public lands issues. She has a broad conservation perspective as well as her background and expertise in all of the EPA media statutes like the Clean Water Act, the Clean Air Act and all the EPA jurisdictional statutes. And because she was at CEQ before, she is probably coming in with the best background qualifications of any CEQ chair, ever."

Mallory, who is Black, served as CEQ general counsel during the Obama administration and is now director of regulatory policy for the Southern Environmental Law Center, which has been active in challenging the Trump CEQ's streamlined NEPA implementing rule. She will be tasked with determining how to address that controversial policy, which CEQ completed in July and made effective in September. The rule is facing five separate district court lawsuits, with the challenge in U.S. District Court for the Western District of Virginia, *Wild Virginia, et al., v. CEQ, et al.*, moving the fastest.

CEQ in a [Dec. 21 filing](#) in that case outlined its opposition to environmentalists' motion for summary judgment and submitted its own cross-motion, arguing that instead of waiting to see what happens when the rule is applied to "on-the-ground proposals . . . Plaintiffs ask the court to review the Rule on its face. Plaintiffs speculate about what impacts future actions planned under the Rule might have. This sort of abstract facial review falls well outside the Court's jurisdiction."

Just before the election, Boling told *Inside EPA* there was an "active debate" about what Biden officials might do about the rule. "The NEPA rule is different from other rules from the standpoint that it is a rule of administrative procedures for federal agencies that by its own terms requires the implementing agency to come up with amendments to their NEPA procedures by September 2021," he said. "So, there's some time to manage that transition."

NEPA requires federal agencies to disclose and analyze the environmental effects of "major" actions and to consider less-harmful alternatives. The new rule makes many controversial changes to the process, including limiting which actions must undergo a NEPA review at all, limiting the time and page numbers of such reviews, and removing explicit requirements to consider "indirect" and "cumulative" effects.

Climate Guidance

Boling notes that he and Mallory worked closely on a separate Obama-era NEPA guidance about how to incorporate climate change into environmental reviews. The Trump CEQ rescinded that guidance and issued a much narrower draft replacement that it has yet to finalize.

Mallory "knows that area and is in a great position to assist the Biden administration, and the response to the Trump administration update to the CEQ regulations, including how to go about addressing the many concerns and claims that have been leveled against that," he says.

She is also expected to be able to deftly address EJ, issues about cumulative impacts, as well as "just the management of the NEPA process" including conflict resolution, he says.

Tim Male, another former CEQ official who now runs the Environmental Policy Innovation Center, where Mallory is a member of the board, calls her "just an incredibly decent person. . . . She comes across as someone who is trying to make something happen but is respectful of everybody involved."

As head of CEQ, "I think of her as a really important ally in the Biden-Harris administration" who will figure out what can be done under legal constraints, rather than rejecting creative approaches as not explicitly authorized by statute. "That is so important right now with climate change and everything else," Male says.

More broadly, these sources and others hope that Mallory will help shepherd NEPA to better include climate considerations in a durable manner.

Male points out that one way to do this is to shift the agency's focus more toward section 101 of the NEPA statute, which "talks about minimizing our impacts," rather than section 102, which is where the CEQ rule is focused and "is where all the procedures are. . . . How do you get those goals in section 101 to interact with the section 102 . . . processes created and interpreted under the current regulations?" he asks.

"I think the challenge . . . is there's the real question of how do you make it a practical thing and not just hand waving. That is a huge challenge," Male says.

One NEPA expert expects the Biden CEQ to soften several streamlining measures in the new rule. For example, hard deadlines for completing environmental assessments and environmental impact statements can be replaced by requirements to elevate the review to the deputy secretary level and/or CEQ if certain deadlines slip.

This source also hopes that Mallory can instill implementing rule changes with the various agencies that conduct NEPA reviews, so it is "not just agencies going back to their corners. I am excited about . . . a coordinated, strong approach because my general belief is that agencies, left to their own devices, go back to the way they've always been doing things, so they will need strong direction."

A second NEPA expert notes that the only agency that has proposed a rule to align its requirements with the CEQ standards is the Department of Transportation (DOT), which denied requests from public transit agencies, state highway agencies and others to extend the public comment period that ends Dec. 23.

That shows that DOT is "determined to move forward with its rulemaking within this administration," the source notes. However, the proposal is a framework for DOT and doesn't necessarily directly affect its operating agencies such as the Federal Highway Administration, the transit administration and the railway administration.

One "interesting problem" with the CEQ rules is they are supposed to "supersede" any regulation that is "inconsistent" after the rule's Sept. 14 effective date. However, "no agency has identified any inconsistency . . . nor has there been a response to how it is that CEQ purports to effectively overrule agency regulations that were duly adopted," the source says.

The rule also gives agencies until Sept. 14, 2021, to float updates to their own NEPA rules to conform to CEQ's, which means "the new administration will have almost nine months before the CEQ rules require even a proposal from agencies, and it doesn't require them to go final in any particular timeframe. That leaves time for the new administration to work a public process to figure out what it wants to do via rulemaking versus implementation guidance to make the NEPA process fit the policy agenda of the Biden administration," the source says.

Biden CEQ Strategy

During that time, Mallory will have to determine a strategy for these issues, such as whether to withdraw the CEQ rule entirely, which would require a long and detailed process outlined by the Administrative Procedure Act. She could also opt to do something "targeted as narrowly as addressing the effective date . . . or a mid-range rulemaking that amends the CEQ rule without eliminating all of its provisions because there are presumably some things in there the Biden administration will like," such as a broader role for tribes, the second NEPA expert says.

The Biden administration might also retain provisions requiring expanded scoping and directing CEQ to better manage agencies implementing NEPA.

Mallory is also likely to seek speedier reviews for environmentally friendly projects, which the source says is possible with targeted resources.

Also, Robert Verchick, president of the Center for Progressive Reform, outlined in a [Dec. 17 blog post](#) four things the Biden CEQ can do immediately, including repeal Executive Order 13807 which led the way to the new NEPA rule, restore guidance on cumulative climate impacts, restart climate adaptation planning and renew CEQ's EJ focus.

Under Mallory, CEQ will "need to proactively coordinate efforts across federal agencies and ensure that the existing order on environmental justice is fully and equitably implemented," Verchick writes.

News of Mallory's Dec. 16 nomination to the Senate-confirmed role prompted swift praise from many corners.

Kate Konschnik of Duke University's Nicholas Institute for Environmental Policy Solutions, who spoke on a Dec. 15 web event with Mallory, tells *Inside EPA*: "This is a good day for the environment. Brenda is whip-smart, well-respected and a terrific team player."

Sen. Tom Carper (D-DE), ranking member of the Senate environment committee, added in a statement that Mallory is "supremely qualified," "already knows the agency inside and out," and will be able to "position CEQ for the future." -- *Dawn*

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